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IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-1012

HUNTSVILLE BOARD OF EDUCATION, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,

and

SONNIE WELLINGTON HEREFORD, IV, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

Petitioner, Huntsville Board of Education respectfully prays that a Writ of Certiorari issue to review the Judgment and Mandate of the U. S. Court of Appeals for the Fifth Circuit entered in this proceeding on November 20, 1974.

1. OPINIONS BELOW

The opinion dated November 20, 1974 of the Court of Appeals for the Fifth Circuit is reported at 504 F.2d 857 (5th Cir. 1974) and is reproduced in Appendix A hereto. The De-

cree and Findings of Fact and Conclusions of Law entered August 14, 1974 by the District Court are not reported and are reproduced in Appendix B hereto.

2. JURISDICTION

An order was issued on November 20, 1974 by the United States Court of Appeals for the 5th Circuit. The mandate was issued simultaneously with the order; consequently no motion for rehearing was filed in the Court of Appeals.

This Court has jurisdiction to review the opinion below pursuant to provisions of Title 28, §1254.

3. QUESTIONS PRESENTED

I. Is an elected Southern school board which has attained a unitary school system to be held to the same standards in desegregation cases as are school boards in other sections of the United States which also operate unitary school systems?

II. When a local school board has conscientiously endeavored to eliminate racial imbalance in all schools and has attained a unitary system, is it constitutionally required to adopt a busing plan involving several desegregated schools in order to eliminate an intractable remnant of racial imbalance in one elementary school containing only 1% of the system's students?

III. Where (1) residential housing patterns cause racial imbalance in one school despite the use by the school board of racially neutral school zoning and racial transfer policies, and (2) where the governmental influences on such imbalance constitute federal rather than state action, is the school board required under the 14th Amendment to bear the full burden of eliminating such imbalance?

IV. Where an elected school board which accurately represents the racial composition of the community and which has already achieved a unitary school system devises an additional plan for its unitary school system, which plan takes into account educational considerations, financial considerations, the imposition of the burdens of busing on black pupils, the likelihood of white pupils leaving the public school system and the expressed desires of the populace, is it proper for the Court of Appeals to require additional plans to eliminate racial imbalance in one school, in the face of a finding by the District Court that such additional plans would jeopardize desegregation already achieved in the system?

4. CONSTITUTIONAL PROVISION INVOLVED

The Equal Protection Clause of the 14th Amendment to the United States Constitution.

5. STATEMENT OF THE CASE

a. General Statement.

This is a school desegregation case which was commenced by the voluntary filing in the District Court of a plan for adoption of a "middle school" concept. The plan was concededly based on racially neutral criteria and it has never been suggested that the new concept was in any way related to segregative intent or to racial imbalance in the school system or in any one school.

The United States seized the opportunity of the filing of the middle school proposal, however, to raise the question of racial imbalance in two schools out of the 39 schools in the Huntsville school system. The District Court granted the petition of the Huntsville Board of Education over the objections of racial

imbalance in the two schools, and found that the Huntsville school system was "well integrated," (A-9) that school assignments are "genuinely non-discriminatory," (A-11) and that the Huntsville Board of Education has "not attempted to halt or slow desegregation within the district." (A-12)

The U. S. Court of Appeals for the 5th Circuit affirmed in part and reversed and remanded as to *one* elementary school [Cavalry Hill School] which contains only 383 pupils out of 34,181 pupils in the entire system. Without in any way disturbing the findings of the District Court that the *system* was well integrated and that assignments are made on a genuinely non-discriminatory basis, the Court of Appeals found that racial imbalance in the *one school* required a remand to the District Court for a new desegregation plan to alleviate imbalance in that *one school*. The Court of Appeals further directed the District Court to follow the remedy for desegregation in *Cisneros v. Corpus Christi Independent School System*, 467 F.2d 142 (5th Cir. 1972) (which the Court of Appeals itself described as a "novel desegregation case involving blacks, Anglos and Mexican-Americans" (467 F.2d at 144)) which calls for pairing and clustering schools within contiguous zones, despite the finding by the District Court that such a plan would jeopardize the desegregation already achieved in the Huntsville school system.

All indications, including the length of the opinion of the Court of Appeals, point cursory treatment of this case by the Court of Appeals based almost entirely upon the racial ratio in one school. The conclusion is difficult to avoid that the Court of Appeals, in remanding the case for further consideration as to *one school*, mechanically applied a ratio test without disturbing any of the factual findings of the District Court, a court which the 5th Circuit Court of Appeals itself has recognized as the most experienced court in desegregation cases in the State of Alabama. See *Lee v. City of Troy Bd. of*

Education, 432 F.2d 819 (5th Cir. 1970). This Court has noted in *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 12, 32 (1971) that great reliance should be placed on the District Court because of its proximity to the situation.

b. **Factual Background.**

The Huntsville School System was a dual system at the time of *Brown v. Board of Education*, 347 U.S. 483 (1954) and extensive changes have been made in that system since the *Brown* decision. It should also be noted that truly remarkable change and expansion has taken place in Huntsville during this period, resulting in an increase in population from approximately 18,000 to 143,000 and an increase in student enrollment from 3100 to 34,000. Affirmative action by the Board of Education during this period, particularly since 1963, has achieved the "well integrated" system found by the District Court. In thus achieving a unitary system within the meaning of *Alexander v. Holmes Co. Bd. of Education*, 396 U.S. 19 (1969), the Huntsville Board of Education has demonstrated its leadership among formerly dual systems.

Extraordinary citizen interest in the school system is well illustrated by the change in 1972 to an elected school board and the increased property tax voted in 1973 in support of schools. Such a vote is a somewhat unusual phenomenon in the 1970's and reflects unique public interest in the school system. Elections for the school board have been fiercely contested with full participation by all segments of the populace, and school board meetings are regularly attended by the public. It is significant that the school board accurately reflects the racial composition of the electorate and is served by a black President. No member of the present school board served during the years when a dual system was operated by an appointive board.

The school system which serves over 34,000 pupils secured full accreditation in 1974 for all 39 of its schools, and thus became the largest school system in the State of Alabama to acquire this distinction. Such accreditation will be nullified in the affected schools if the plan of the Court of Appeals is adopted.

Since 1963 the school board has filed desegregation plans with the District Court with a view toward wholly dismantling the dual system which once existed. Cavalry Hill School, the one school found insufficiently balanced racially by the Court of Appeals, was rezoned in 1971 with the explicit purpose of assigning more white students to that school and thus not placing the entire burden of desegregation upon black pupils. The result has been that a large percentage of the white pupils assigned to Cavalry Hill School did not attend but left the public school system. No white pupils assigned to the Cavalry Hill zone are attending schools outside this zone, as found by the District Court.

In conjunction with previous desegregation plans implemented by the Huntsville Board of Education a majority to minority transfer option has been available with transportation costs absorbed by the Huntsville Board of Education. Thus, although the Huntsville Board of Education operates no transportation system, all students at the one school in question have had the option of transferring with transportation provided to any school with a white majority of pupils. This plan fully complies with the requirements for such programs laid down in *Swann*, 402 U.S. 1, 26-27 (1971).

The racial imbalance of Cavalry Hill is undeniably caused by residential housing patterns and exists *in spite* of efforts of the Huntsville Board of Education to alleviate the imbalance. The housing patterns exist largely because of a federal housing project which surrounds the school and is overwhelmingly black.

The federal government, before granting funds for its construction, assured that the project would be inhabited entirely by black families and has continued this policy through funding under the Annual Contributions Contract, all of which is wholly beyond the control of the Huntsville Board of Education.

Additional federal programs, including Head Start and Follow Through, have further aggravated the racial imbalance which does exist and have frustrated the efforts of the Huntsville Board of Education to desegregate its system consistent with a high level of education. Under the Follow Through program entire classes must be kept intact with teachers, which will have the effect of moving entire classes, regardless of their present racial balance, into different buildings at greater distances under the plan contemplated by the Court of Appeals. Thus, unless the federal programs are discontinued, there can be no additional desegregation of this school for some years, *if ever*, under the remedy ordered by the Court of Appeals.

A program of exemplary career education is being implemented at Cavalry Hill School to improve instruction there and to attract white students assigned there back into the public school system. The District Court approved this plan after hearing extensive testimony concerning its educational advantages and found the career program to be "part of a plan to improve the quality of education at that school [Cavalry Hill]." (A-12) The Court of Appeals ordered that another plan be adopted before the exemplary education program was allowed to achieve any demonstrable results either in the quality of education or in eliminating racial imbalance.

The students involved in this case comprise only 6½% of the black students in the entire system and 1% of all students. They will attend Cavalry Hill for only 5 years and will then attend grades 6-12 in fully integrated schools to which no objection has been raised as to racial imbalance. Thus the focus

of this case is entirely upon elementary age children who stand to suffer the most disruptive effects. See *Keyes v. School District No. 1*, 413 U.S. 189, 253 (1973), Powell, J.

Because of the limited capacity of Cavalry Hill, any plan which meets the requirements of the Court of Appeals will involve busing a majority of black pupils *out* of their neighborhood school and will thus place a major burden on those pupils, a burden which is no way diminished by the busing of white students *into* Cavalry Hill. The testimony at trial in fact revealed that the burden *would* be significantly greater on black pupils in Cavalry Hill as many are members of one-member families and are more highly prone to be absentees in distant schools.

c. **Course of Litigation.**

It is plain that the Huntsville Board of Education has been quite diligent during the years since 1963 in dismantling a dual school system. The District Court recognized those efforts which had been quite successful in the system as a whole. In the one school where racial imbalance was found too great, the District Court recognized that such imbalance existed "not for the lack of a good faith effort on the part of the Huntsville Board of Education to desegregate it," (A-11) and found that alternative plans "could well disrupt the progress already achieved in the desegregation of the system and the schools involved and retard the process rather than advance it." (A-13)

The Court of Appeals disturbed none of these findings, but instead applied mechanically a racial yardstick which found desegregation lacking in *one school*, which the Court found was the "tag end" (A-1) of desegregation. Rather clearly the Court of Appeals did not consider in any depth the decision of the District Court or the recent decisions of this court, but merely

found what it considered a regrettable racial percentage and converted this percentage into a constitutional violation.

The Court of Appeals has denied Huntsville Board of Education's request for a stay pending certiorari to this Court, and this Court has upheld this decision. Thus while additional desegregation plans will be filed in the District Court pending a ruling by this Court, the need for prompt review by this Court is evident.

6. ARGUMENT

I. The Huntsville Board of Education Should Be Accorded the Same Treatment as That Accorded School Boards Throughout the United States Which Have Created Unitary School Systems.

It was clearly stated in *Swann*, 402 U.S. 1, at 32, that a school board which formerly administered a dual system would be tested by a different set of criteria and presumptions once it has dismantled that dual system and substituted a unitary system, and that year by year adjustments of the racial composition of student bodies would no longer be required unless "the school authorities or some other agency of the *State* has *deliberately* attempted to fix or alter demographic patterns to affect the racial compositions of the schools." (Emphasis added) This language was quoted with approval in *Bradley v. School Board*, 462 F.2d 1058 (4th Cir. 1972), affd. 412 U.S. 92 (1973). This Court further emphasized in *Swann* the importance of the District Court and its proximity to the situation. See *Milliken v. Bradley*, —U.S.—, 94 S.Ct. 3112 at 3139 (1974) (dissenting opinion, White, J.).

Both of these elements become more critical in the context of the instant case, which could provide this Court with its first opportunity for examining a truly unitary system in a Southern state and thus enunciating the standards applicable to such systems. As the District Court found that a unitary system did exist and that the pupil assignment plans of the Huntsville Board of Education were fully constitutional, this Court is called upon to determine the validity of the ruling of the Court of Appeals, which clearly treated the Huntsville Board of Education as if it were still a dual Southern system subject to quasi-punitive presumptions of segregative intent and of greater duties

of affirmative action regardless of intent than those shouldered by non-southern unitary systems.

It is submitted that a presumption of unconstitutionality of an action by a lawfully elected body is a real aberration in the law (See *Jones v. Valtierra*, 402 U.S. 137 (1971)), and that such an aberration should not be extended to apply to a School Board which has, through its affirmative action, created a truly unitary system where a dual one formerly existed. It is further submitted that the aberration is particularly inappropriate where the School Board was freely elected and where only an intractable remnant of segregation involving less than 6½% of the black students in the system and 1% of all students are involved. It should be remembered that "it is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33 (1973).

Rather clearly such presumptions are not applied to non-southern school districts. Cases in several Courts of Appeal in which this Court has denied certiorari have distinctly held that segregation caused by factors beyond the control of a school board do not create a constitutional violation. *Bell v. School, City of Gary*, 324 F.2d 209 (7th Cir. 1963), cert. den. 377 U.S. 924 (1964), *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), cert. den. 389 U.S. 847 (1967); *Downs v. Board of Education*, 336 F.2d 988 (10th Cir. 1964), cert. den. 380 U.S. 914 (1965). Neither should these presumptions be applied to southern school districts which have achieved unitary systems. To continue application of the presumptions would serve only to penalize a diligent school board and to create a ludicrous and pointless distinction between regions. As noted in *Johnson v. San Francisco Unified School District*, 339 F.Supp. 1315, at 1318 (N.D. Cal. 1971), the distinction between northern and southern school districts "may possibly

have some peripheral historical and geographical validity" but has "no validity in law or equity."

Serious questions have been raised prior to this time about the propriety of a dual standard for southern and northern schools. See, e.g., *Keyes v. School District No. 1*, 413 U.S. 189, at 218-223. While there may be some justification for imposing a presumption of racial motivation on a school board operating a formerly de jure dual system where substantial racial imbalance persists, the entire rationale for such a rule dissipates when one is faced with a *unitary* southern system. Once this is achieved there is no basis for a dual standard and its continuation under such circumstances is an affront both to the region and to the Constitution (particularly the Equal Protection Clause of the 14th Amendment).

Since increasing numbers of southern school districts will achieve unitary systems in the near future, the anomalous double standard will grow in importance and spread its perniciousness throughout the American educational system, causing immense harm to the cause of even-handed justice and the respect of law. Clearly, the time has arrived to announce *a national* standard to be applied to unitary school systems which find themselves in desegregation cases.

Even where a presumption of racial motivation is applied to a school board, however, the board is entitled to prove that racial imbalance did not occur because of its action or inaction. *Keyes*, 413 U.S. 189, at 210-11 (1973). That such proof was adequately presented by the school board is evident from the District Court's finding of fact that racial imbalance was "not for the lack of a good faith effort on the part of the Huntsville Board of Education." The ruling of the Court of Appeals in effect states that a southern school district *cannot* overcome the presumption.

The Fifth Circuit Court of Appeals by its ruling failed to follow *Swann* and the direction of this Court that it not impose artificial quotas or ratios on every school, and is in conflict with this Court's later ruling in *Milliken*. Since this Court of Appeals will hear numerous appeals involving school districts which are now achieving or have only recently achieved unitary systems, it is imperative that additional guidance be given to that Court to prevent extension of repugnant double standard.

II. The Huntsville Board of Education Is Not Constitutionally Required to Eliminate Racial Imbalance in EVERY School Once It Has Achieved a Unitary System, Particularly Where the One School Concerned Contains Only 1% of the System's Students and Is an Intractable Remnant of Racial Imbalance.

Essential to any workable national standard in desegregation cases is the element of reasonableness, which does not envision precise quotas or ratios in *every school* but looks toward the *entire system* when evaluating the progress of desegregation. Indeed this Court in *Swann*, 402 U.S. 1, 23-24, rejected the use of ratios or quotas in each school and noted that the system itself was to be desegregated. Since *Swann* both *Spencer v. Kugler*, 404 U.S. 1027 (1972) and *Milliken v. Bradley*, 94 S.Ct. 3112, 3125 (1974) have reinforced this motion that quotas are not to be required. The Court noted in *Milliken* that "desegregation, *in the sense of dismantling a dual school system*, does not require any particular racial balance in each school, grade or classroom." (emphasis added) This language is also a rather clear indication that a common national standard is proper in school desegregation cases, and that the duty to dismantle a dual system does not justify the imposition of crippling racial quotas in all schools.

The standard suggested in *Keyes* requiring a finding of state-imposed segregation as to a "substantial portion", 413 U.S. at

200, or a "meaningful or significant portion", 413 U.S. at 233 (Powell, J.), of the school system before finding a constitutional violation is clearly a sound one. Any standard which is adopted by this Court should require that a significant portion of the system be involved before having the federal courts interpose their judgments on educational policy for those of the school board.

Where an insignificant portion which has proved to be an intractable remnant of racial imbalance is concerned, there should be no finding of a constitutional violation where legitimate efforts have been made by the school board to extirpate the remnant. If the *system* itself is unitary, the constitutional mandate has been satisfied. See *Keyes*, 413 U.S. 189 at 244 (1973). The United States has conceded as much in prior litigation. See Memorandum Brief of United States in *Swann* at p. 18.

The holding of this Court in *Keyes* demonstrates the continuing relevance of both the number of minority students involved and the motivation of the school board, and both *San Antonio*, 411 U.S. at 55 and *Milliken, supra*, emphasize the importance of the intent of the school board. Had as few as 6% of the minority students in *Keyes* been involved and had there been no finding of intentional creation or preservation of racial balance in *Keyes*, there can be no question as to the outcome: the action of the school board would have been upheld. For a different result to issue in a southern district would constitute an invidious discrimination which cannot be countenanced by this Court.

Although sentiment exists for abandonment of any consideration of intent (*Keyes*, 413 U.S. 189, 233-235 (Powell, J.), *Wright v. Council of City of Emporia*, 407 U.S. 451, 462 (1972)), it remains a proper element to be considered. The United States itself has taken this position in *Keyes* and *Cisneros*. See Memorandum for United States in *Cisneros*, No. 72-649 and No. 72-668 (1972) at p. 4. Where there is *no*

evidence of segregative intent, however, there should be a minimum requirement that a significant portion of a school system be racially imbalanced in order to create a constitutional violation. In this manner the eminently reasonable rule has developed which states that there may even be some *one-race* schools which are not "segregated" within the context of a fair and workable constitutional framework. See *Swann*, 402 U.S. 1 at 25 (1971), and *Keyes*, 413 U.S. 189 at 227 (1973).

It is well to remember that there is no support whatever outside the field of education for forced racial mixing. In other areas involving housing, public facilities, and participation in the political process, the 14th Amendment has been read negatively to *prevent* discrimination alone and not to impose an *affirmative* "corrective" remedy. See Goodman, "De Facto Segregation: A Constitutional and Empirical Analysis," 60 California L.Rev. 275 at 389 (1973). This Court has further stated in *San Antonio* that "[e]ducation of course is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." 411 U.S. 1 at 43 (1973).

Thus to the extent that such an extraordinary remedy is judicially imposed under the tenuous authority of the 14th Amendment (which is couched in undeniably negative terms), great care should be exercised to avoid its application to a school board which has acted wholly without discriminatory intent. To impose an affirmative duty of busing on a school board in order to eliminate a situation which was wholly beyond its power to prevent would do the ultimate violence to a rational reading of the 14th Amendment and would run contrary to this Court's admonition in *San Antonio* that the federal judiciary refrain from imposing "inflexible constitutional restraints" which would "circumscribe or handicap school authorities." 411 U.S. 1 at 43 (1973).

III. The Huntsville Board of Education Is Not Constitutionally Required to Eliminate Racial Imbalance Caused by Housing Patterns and by the Action of Federal Agencies and Not Caused by Any Act or Omission of the Huntsville Board of Education.

This Court has thus far declined to consider the question of racial imbalance caused not by acts or omissions of the school board but by "de facto" housing patterns. Such a phenomenon is a national one and one that requires the decision of this Court.

It cannot be seriously contended that the racial imbalance at issue in this case was caused by any action of the school board. To the extent that any governmental action is involved, federal action rather than state action has been the causal factor. Although such a distinction has not been made by this Court in desegregation cases, it is submitted that a sound basis exists for such a distinction both in logic and in terms of the 14th Amendment, particularly in the instant case where *federal* action dictated segregated housing through the Annual Contributions Contract with the local Housing Authority and where *federal* programs insured segregated classrooms even within an integrated building. Precisely this distinction is recognized in *People v. San Diego School District*, 96 Cal.Rptr. 658 (Cal. 1971), where state action was defined as "state and local government action." Clearly no state action as thus defined is present in the instant case.

For this Court to reverse the Court of Appeals as urged by the petitioner because of the absence of state action in the instant case, however, is hardly to state that there is *no* remedy to racial imbalance in the neighborhood or the classroom. The path is certainly open for those federal agencies which have created and maintained the racial imbalance in housing and classrooms to take steps within their own programs to reverse this trend. Such corrective action by the very agencies which created the problem

would certainly seem more appropriate than imposition of the entire burden of corrective action upon the school board and upon elementary pupils under circumstances which are certain to be detrimental to the educational quality in the system.

It has been noted by this Court in *Swann* that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, 402 U.S. 1 at 16 (1971), *Milliken*, — U.S. —, 94 S.Ct. 3112 at 3127. In *Milliken* some of the school districts involved were not responsible for the racial imbalance encountered there and were thus not constitutionally compelled to fashion a remedy, even though some state (rather than federal) action was undeniably involved. Such an approach would of course also be appropriate to the instant case. Certainly the "controlling principle" stated above (See *Milliken*, — U.S. —, 94 S.Ct. at 3127) should require that the governmental agencies creating the constitutional violation take the remedial action.

An approach which declines to order remedies on the part of agencies which create the imbalance yet which forces affirmative remedies on a school board which has consistently applied racially neutral criteria is foreign to the entire concept of equity. Furthermore, such an approach does needless violence to the concept of the neighborhood school to the detriment of all pupils involved. While it is certainly well settled that a neighborhood school plan (or any other apparently neutral assignment policy) may not be used as a mere subterfuge to perpetuate imbalance and inequality, *Green v. County School Board of New Kent, Va.*, 391 U.S. 430 (1968), a very different situation is presented where the neighborhood plan is employed as a useful educational tool. The fact that the District Court, which has extensive experience in the field of school desegregation and with the Huntsville school situation, found that the neighborhood school zone is the "appropriate basis for determining public school assignments" (A-12) in Huntsville should be accorded great weight on

this question. It is to be noted that the Court of Appeals in no way challenged this finding but instead issued a cursory ruling based upon racial quotas, a ruling which will undeniably do violence to the neighborhood school system. This court has recognized that factors other than race are to be accorded weight in fashioning a remedy in a desegregation decree (See *Milliken*, — U.S. —, 94 S.Ct. 3112, 3125-26 (1974), a proposition apparently ignored by the 5th Circuit Court of Appeals.

Since the uncontested finding of the District Court indicated that the Huntsville Board of Education had no part in either creating or maintaining racial imbalance in Cavalry Hill School or the surrounding neighborhood, that Huntsville Board of Education has in fact taken affirmative steps consistent with sound educational practices to eliminate this imbalance (albeit with limited success in the one school) and that other federal agencies who are responsible for the imbalance have taken no affirmative steps to eliminate it, further affirmative action by the Huntsville Board of Education is not constitutionally compelled and the order of the United States Court of Appeals should be reversed. In view of the finding of the District Court that further affirmative action of the sort contemplated by the Court of Appeals would have the effect of jeopardizing desegregation already achieved, the order of the Court of Appeals is even less defensible.

The question was specifically reserved by this Court in *Swann* of whether a constitutional violation is committed where school segregation is a consequence of other types of *state* action without any discriminatory action by the school authorities. *Swann*, 402 U.S. 1 at 23 (1971). This issue of course does not even comprehend the distinction between federal and state action.

It is submitted that the question reserved in *Swann* is particularly ripe for decision in the instant case where the existing racial imbalance was in no way created or maintained by action

of the school board. The fact that federal rather than state action accounts for the governmental influence that *is* present further undermines the already weak case for judicial imposition of additional affirmative duties on the school. Such an imposition on the school board alone is neither constitutionally compelled nor consonant with elemental notions of equity and fairness.

IV. **The Federal Judiciary Should Not Substitute Its Judgment on Educational Matters for That of a Fairly Elected School Board.**

With the findings of the District Court undisturbed as to the lack of racial motivation on the part of the Huntsville Board of Education, a fundamental question is raised by the decision of the Court of Appeals which goes to the heart of the democratic process itself. On an issue of great importance to all voters, the decision of a fairly elected, representative school board is to be overturned by the federal judiciary. Despite evidence that disruption of the educational system will result from such a ruling, the Court of Appeals has substituted its judgment for that of the School Board on matters of educational policy, seemingly without regard to considerations of local autonomy.

Such indifference to local control over schools can hardly be supported by the holdings of this Court, particularly in cases where the local authorities are free of any taint of racial animus. According to the latest pronouncement of this Court in ***Milliken***, — U.S. —, 94 S.Ct. 3112 at 3125-26 (1974),

> "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."

Such local control has been recognized as affording citizens an opportunity to participate in the decision-making process, permitting the structuring of school programs to fit local needs and encouraging "experimentation, innovation, and a healthy competition for educational excellence." *San Antonio*, 411 U.S. 1, 50 (1973). Furthermore, in warning of the possibility that the District Court might become a de facto "legislative authority" and then the "school superintendent," this Court in *Milliken*, — U.S. —, 94 S.Ct. 3112 at 3127 (1974) found that such a task would be one which "few, if any judges are qualified to perform and one which *would deprive the people of control of school through their elected representatives.*" (Emphasis added.) Deference to local control would seem peculiarly appropriate in the instant case where there is demonstrable public interest in the schools, a fairly elected school board and educational excellence within the system.

In making its decision the Huntsville Board of Education took into account many factors, all of which have been deemed legitimate by this Court. (This Court has noted in *San Antonio*, 411 U.S. 1, 42 (1973) that "education . . . presents a myriad of intractable economic, social and even philosophical problems.") Included among the considerations are the quality of the educational program (including full accreditation which has been achieved in *all* schools in the district), the disruption of progress already achieved in desegregation and the desire to avoid "resegregation" or reversion from a unitary system to a dual one, financial considerations (which become quite weighty in view of the cost of buses and the absence of a current transportation system), and the very real possibility of "white flight." While the United States seemed to concede that educational considerations could be accorded some weight, the other factors were treated as improper subjects for the Board's consideration, a view which was apparently shared by the Court of Appeals.

This Court's most recent pronouncement in *Milliken* makes it clear that "white flight" is a legitimate consideration for the Dis-

trict Court to take into account in fashioning a decree. It is even noted in Justice Marshall's dissenting opinion that this Court itself took the possibility of white flight into account in evaluating the effectiveness of a desegregation plan in *Wright v. Council of City of Emporia*, 407 U.S. 451 at 464 (1972), and that "one *cannot* ignore the white-flight problem." *Milliken*, — U.S. —, 94 S.Ct. at 3155 (Marshall, J. dissenting). One district court has properly found that a plan was not workable since white flight might result. *Calhoun v. Cook*, 332 F.Supp. 804 (N.D. Ga. 1971) and Justice Coleman in *Russell v. Greenwood Municipal Separate School Dist.*, 445 F.2d 388, 390 (Coleman, J. dissenting) has aptly observed that an order which fails to consider "white flight" fails to meet the requirement established in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968) of "a plan that promises *realistically* to work now." (Emphasis added.)

This Court has also affirmed in *Milliken*, — U.S. —, 94 S.Ct. 3112 at 3127 (1974) that disruption and alteration of the structure of public education is a legitimate factor in evaluating a desegregation plan.

The underlying implications for the democratic process and for local participation in the school system transcend all of these considerations, however. Where elected representatives have properly responded to the expressed educational needs of all segments of a local community, but are overruled by the federal judiciary because of racial imbalance in *one school*, there is more than mere trivial interference with the democratic process. A better formula for discouraging active interest and participation in school elections and school affairs can scarcely be envisioned than to allow authority on issues in which citizens show the greatest interest to be usurped from the elected officials by an unelected, unresponsive judiciary. While the District Court which heard the evidence wisely eschewed this affront to representative government, the Court of Appeals felt compelled to substitute its own judgment as the final arbiter.

7. REASONS FOR GRANTING THE WRIT

More than 20 years have now passed since this Court decided *Brown v. Board of Education* and great changes have taken place in Southern schools since that time. The pace of change was accelerated by *Green* and *Alexander* and the methods used altered by *Swann*. The fundamental issue which this Court needs to face squarely is that of how to treat school districts which were dual but are now unitary. The Huntsville School System involved in this case has achieved a unitary system but is still being held to standards applied to dual systems (with all their presumptions of racial motivation) while identical school systems in other parts of the country are held to different standards.

Increasing numbers of school boards in the South will achieve unitary systems but will be left with intractable remnants within those districts which are segregated, either because of racial housing patterns or because of the action of federal and state agencies over which a school board has no control. As this Court has not treated a unitary system in the South, it has not yet given adequate guidance to the Courts of Appeal (most particularly the 5th Circuit Court of Appeals) on standards to be applied to these systems. As recognized by numerous separate opinions by Justices of this Court the result has been an unjustified double standard which has imposed unfair and unreasonable burdens upon southern school districts not related to the mandates of this Court requiring desegregation. Guidance by this Court is necessary to develop a uniform national standard to apply to school districts with unitary school systems faced by intractable problems of residential segregation.

There is a clear conflict between the 5th Circuit Court of Appeals and other Courts of Appeal on this issue, a conflict which will have increasingly important repercussions as southern school

districts move from dual to unitary systems and face problems of residential housing patterns which do not lend themselves to old remedies. Unless some guidance is provided by this Court the public school systems will suffer a grievous loss in numbers of students, in the quality of education, and in the interest and support of parents and taxpayers. The result could prove to be nothing short of destruction of the public school system in many areas.

The writ should also be granted in order to establish the proper relationship between local control of schools through elected officials and directives of affirmative action by federal courts in school cases. The issue is of crucial importance to the viability of the democratic process, particularly where the public takes an active interest in the matters involved and elects a school board (which is reflective of the racial composition of the community) to achieve a quality educational product in conformity with their wishes. While the elected Board clearly cannot discriminate against racial minorities, even if such is the will of the majority, a real blow is struck at basic democratic principles as well as at local autonomy for a federal court decree to overturn the action of elected officials in the absence of any discriminatory intent on the part of the school board and in the absence of a showing that the school board acted contrary to the wishes of either the majority or the minority. Clearly a point must be reached where the value of racial balance in *every* school must be weighed against the right of the populace to be heard through elected officials. This case presents an ideal occasion for this Court to redress an imbalance which is in serious danger of submerging traditional democratic rights, and to give substance to its holding in *San Antonio* that "[t]he ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them". 411 U.S. at 59 (1973).

Neither of these critical questions have heretofore been settled by this Court, but both desperately need to be settled.

Until such questions are settled, the federal courts will inevitably be drawn into situations of substituting their judgment for that of elected officials and school superintendents on important matters of educational policy beyond their spheres of expertise and beyond the proper limits of their jurisdictional mandate.

Finally it is apparent that additional guidelines are needed from this Court in deciding residential segregation cases. The Court of Appeals merely directed that a plan be implemented in accordance with *Cisneros*, 467 F.2d 142, 144 (5th Cir. 1972) which the opinion itself stated was "a novel school desegregation case" and "unlike cases involving the traditional black-white dual systems." Thus "novel case" provides hardly any workable guidelines to the District Court or to urban school boards throughout the South.

For the above reasons the judgment and mandate of the Court of Appeals for the Fifth Circuit should be reversed and the judgment of the U.S. District Court for the Northern District of Alabama reinstated.

Respectfully submitted

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APPENDIX

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 74-3363

Sonnie Wellington Hereford, IV., et al.,
Plaintiffs

United States of America,
Plaintiff-Appellant,

v.

Huntsville Board of Education, et al.,
Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Alabama

OPINION

(November 20, 1974)

Before Bell, Ainsworth, and Godbold, Circuit Judges.

Bell, Circuit Judge:

This appeal presents a tag end to the litigation involving the desegregation of the Huntsville School system. In 1974 we affirmed the approval by the district court of a plan of student assignment formulated by HEW. *Hereford v. Huntsville Board of Education*, 5 Cir., 1971, 448 F.2d 784. At that time plaintiffs and the Department of Justice sought to have an alterna-

tive HEW plan substituted with respect to the two schools here involved, Calvary Hill and Terry Heights.

All remained quiet until May 1974 when the defendant school board sought court approval of changes in the grade structure of the system's schools to the middle school concept, changes in some attendance zones, and in the use of some buildings. The Department of Justice responded by seeking, *inter alia*, a new desegregation plan for the Calvary (sic) Hill and Terry Heights elementary schools.[1] The district court rejected the Department of Justice prayer as to these two schools after an evidentiary hearing, and the focus of this appeal is this rejection.

We view this case as presenting no more than a motion in the district court for further relief in a typical school desegrecation case where modification is indicated because of lack of success. *Cf. Ellis v. Board of Public Instruction of Orange County, Florida*, 5 Cir., 1974, 465 F.2d 878, where we required a new plan as to three schools in a system, which schools had not been desegregated.

The facts here indicate that the district court did not err with respect to the Terry Heights school. The racial ratio of the Huntsville school system is 83 per cent white and 17 per cent black. We approved the 1971 plan on the projection that Terry Heights would be 65.5 per cent black. The testimony in the district court here, and made into a finding, was that the Terry Heights school had stabilized from an attendance standpoint. This finding is well supported. The 1973-74 student population of the school was 71.73 per cent black. It was 70.20 per cent black as of September 20, 1974. This is a small variance from the 1971 projection of 65.5 per cent and we find no

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[1] Plaintiffs made no appearance in the district court but have filed a brief here adopting the position being taken by the Department of Justice.

error in the failure of the district court to require that the plan be modified as to this school.

We have a different view with regard to Calvary (sic) Hill. The 1971 plan projected it to be 67.6 per cent black with 367 white students to attend with 765 black students. The white students have never attended. The maximum number of whites to attend was 55 in the 1971-72 school term. In the 1973-74 term this school was attended by 598 black students and only 25 white students. As of September 1974 there were 368 black students and 15 white students in attendance. The district court should have required that the school board modify the student assignment plan to desegregate the Calvary (sic) Hill school. As in *Ellis v. Orange County, supra,* this school has never been desegregated.

The method of desegregation to be followed is settled in this circuit. See *Cisneros v. Corpus Christi Independent School System,* 5 Cir., 1972, 467 F.2d 142 (en banc). On remand, the district court is directed to follow the remedy set out in *Cisneros,* 467 F.2d at 152-53.

Affirmed in part; Reversed and Remanded in part for further proceedings not inconsistent herewith.

APPENDIX B

In the United States District Court for the
Northern District of Alabama
Northeastern Division

Sonnie Wellington Hereford, IV, et al., Plaintiffs, and The United States of America, Plaintiff-Intervenor, vs. Huntsville Board of Education, et al., Defendants.	Civil Action No. 63-X-109

DECREE

(Filed August 14, 1974)

Pursuant to the findings of fact and conclusions of law filed herewith it is Ordered, Adjudged and Decreed as follows:

1. The changing of the grade structure of the Huntsville school system to provide for a middle school consisting of grades six, seven and eight, and the movement of grade six from elementary schools to the respective middle schools at such time as space becomes available at the middle schools, be and it is hereby approved.

2. The closing of Fifth Avenue Elementary School and its sale to the University of Alabama at Huntsville, and the changing of the zone lines of Blossomwood Elementary School and East Clinton Elementary School to accommodate the closing of said

school, be and they hereby are approved. The zone lines for the schools will be as follows:

Blossomwood Elementary School:

Beginning at Memorial Parkway and Drake Avenue; north on Memorial Parkway to Williams Street, east on Williams to Lowe Avenue; east on Lowe Avenue (new street being constructed) to California; north on California to McClung; east on McClusg to end of Maple Hill Cemetery then a line north and northeast to intersect Bankhead Parkway. This line is down the middle of Toll Gate Road. The eastern boundary is a straight line from a point on Bankhead Parkway just below the top of Monte Sano Mountain which would intersect with Governors Drive; from this point west along a straight line to a point just north of Westminster and Churchill then south to Drake Avenue at Robin Lane; west on Drake to Memorial Parkway.

East Clinton Elementary School:

At Memorial Parkway and Wheeler east on Wheeler and Pratt to the Southern Railroad; then north on the railroad to a point where O'Shaughnessy would intersect; then east along O'Shaughnessy and Bankhead Parkway to a point where Toll Gate Road would intersect. At this point a line southwest down the middle of Toll Gate Road then south to McClung at a point just east of Lily Drive; west on McClung to California; south on California to Lowe Avenue (new street under construction); west on Lowe Avenue and Williams to Memorial Parkway; north on Memorial Parkway to Wheeler Avenue.

3. The changing of the zone lines for Davis Hills Middle School be and it is hereby approved as follows:

This zone bounded by city limits on the north; city limits on the west to Stringfield Road; east on Stringfield Road to

Pulaski Pike; south on Pulaski to Sparkman Drive; east on Sparkman to Memorial Parkway; north on Memorial Parkway to Winchester; then east on Winchester to city limits.

4. The changing of the zone lines for Butler High School, Huntsville High School, and Lee High School be and it hereby is approved as follows:

Butler High School:

Beginning at Jordan Lane and city limits on the west, south on Jordan Lane to Sparkman; east on Sparkman to a power line easement just west on Purdy; south along this easement to Oakwood Avenue; east on Oakwood Avenue to Memorial Parkway; south on Memorial Parkway to Clinton Avenue; west on Clinton Avenue to Indiana; south on Indiana and 1st Street to Johnson Road; east on Johnson Road to Leeman Ferry; south on Leeman Ferry to city limits. The western boundary being the city limits.

Huntsville High School:

Beginning at the city limits and Bankhead Parkway on the east; west along Bankhead Parkway, Pratt Avenue and Holmes to Memorial Parkway; south on Memorial Parkway to Clinton Avenue; west on Clinton Avenue to Indiana; south on Indiana and 1st Street to Johnson Road; east on Johnson Road to Leeman Ferry; south on Leeman Ferry to a point where a line from Four Mile Post Road would intersect; east along this line to Whitesburg Drive at Four Mile Post Road; then north on a line which would be along an easement just west of Tannahill Road (both sides of Tannahill are in Grissom Zone); continue north on a line to a point where an extension of Airport Road would intersect; east along a straight line to city limits. Exception: 9th grade students west of the Parkway in Stone middle school zone to attend Butler High.

Lee High School:

Beginning at city limits and Memorial Parkway on north; south on Memorial Parkway to Sparkman Drive then west on Sparkman to a power line easement west of Purdy; south along this easement to Oakwood Avenue; east on Oakwood Avenue to Memorial Parkway; south on Memorial Parkway to Holmes Avenue; east on Holmes Avenue, Pratt Avenue and Bankhead Parkway to city limits.

5. The location and construction of a new high school on property presently owned by the Huntsville Board of Education on Ivy Avenue near the present Huntsville Vocational Center building be and they hereby are approved.

6. The changing of Cavalry Hill School from a combined elementary and junior high school with grades 1 through 8, to an elementary school with grades 1 through 5 with an Exemplary Career Education oriented program for grades 4 and 5 and with the same attendance zone area it has had since 1971, is hereby adopted and approved.

7. The changing of the attendance zone area of Ed White Middle School to include for grades 6, 7 and 8 the attendance zone area of Cavalry Hill School is hereby adopted and approved. The zone description will be:

Beginning at the city limits on the west at Stringfield Road; east on Stringfield Road to Pulaski Pike; south on Pulaski Pike to Sparkman Drive; east on Sparkman Drive to Memorial Parkway; south on Memorial Parkway to University Drive; west on University Drive to the city limits; north on city limits to the point of beginning.

8. The attendance zone area of Terry Heights Elementary School and the attendance zone area of Roy Stone Middle School shall remain unchanged.

9. The two motions to intervene be, and each of the same is hereby, overruled.

Done this 14th day of August, 1974.

H. H. GROOMS
United States District Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 16, 1974, the defendant Huntsville Board of Education filed with this Court a motion seeking certain changes to its desegregation plan. An in-chambers conference was held on the issues raised in this motion on June 10, 1974. At that conference the plaintiff-intervenor, United States of America, indicated that it had no objection to certain of the suggested changes, and the approval of those changes is hereinafter set out as paragraphs numbered 1 through 5, inclusive, of the decree filed contemporaneously herewith.

At said conference the United States noted that under the proposed plan, the Cavalry Hill School was projected to be 97% black, the Terry Heights School was projected to be 71.73% black, and the Roy Stone School was projected to be 54% black, and at the suggestion of the United States, this Court issued an order directing the School Board to prepare and file a report concerning alternative methods of student assignment for Cavalry Hill School and for Terry Heights School. The School Board filed the required report and made its recommendation.

A petition for intervention was filed by University Park Civic Association, and a petition for intervention was filed by Citizens for Neighborhood Schools. The purported Intervenors participated in the hearing and have filed briefs, all of which have been

carefully considered by the Court. However, the Court is of the opinion that the presence of all these purported Intervenors as parties would unduly complicate the case. On the whole, those presently parties in the case will furnish sufficiently fair representation. Consequently, the two motions to intervene will be overruled.

The previous order of this Court set a hearing on the petition and the report on July 10, 1974, and said hearing was held on July 10, 11 and 12, and testimony was taken in open court. Oral arguments were heard. The United States filed a post-trial submission, and the Huntsville Board of Education and the Intervenors filed briefs, all of which have been carefully considered by the Court.

Findings of Fact

1. The City of Huntsville school system is well integrated. In September 1963, there were 23,201 pupils in the system. Of this number 2376 or 10.24% were non-white. There were three all black schools and eighteen all white schools. There were five other schools in which there was only one non-white, one in which there were three, and one in which there were five. In September 1973, there were 34,181 pupils enrolled. Of this number 5793 or 16.95% were non-white. There were no all black schools. Every school in the system has students of both races except Monte Sano Elementary School, which is located on top of Monte Sano Mountain near the eastern edge of the city limits which is all white and as to which no issue is tendered or exception taken. The enrollment as of September 21, 1973, is shown on defendants' Exhibit 9 attached hereto. The projection for the 1974-1975 school year is shown on United States' Exhibit No. 8 also attached.

2. The United States and Huntsville Board of Education have agreed that the attendance zone area for students in grades 6,

7 and 8, formerly attending Cavalry Hill School, should be added to the attendance zone area for Ed White Middle School and not Roy Stone Middle School, and there is no further controversy concerning Roy Stone Middle School. Cavalry Hill had an enrollment of 960 in September 1970, with only two whites. At the end of May 1971, it had an enrollment of 606 with five whites. On June 2, 1972, the enrollment was 730 with fifty-five whites or 7.44%. In September 1973, there was an enrollment of 623 with twenty-five whites or 4.01%. The projection for September 1974, with the 6, 7 and 8th grades assigned to Ed White Middle School, is for an enrollment of 402 with 13 whites or 3.23%. It is the concensus that with the older grades moved to Ed White the younger whites in the zone, in grades 1 through 5, will look with greater favor on Cavalry Hill. The upgrading of the staff and faculty, together with the institution of the Exemplary Career Education oriented program for grades 4 and 5 should also attract the white children in the zone to the school. The deficiencies of the program at Cavalry Hill has undoubtedly been a material factor in white flight to private schools. The school is now desegregated and in view of the changes and improvements indicated should improve its racial balance.

3. Terry Heights School was formerly all white. When a low-rent housing project in its attendance zone changed from white to black, the residential composition of the rest of the neighborhood began to change. In 1963 the school had only one non-white. By September 1970, the school was 53.04% non-white.

4. In 1971 the United States Office of Education filed for this Court's consideration two plans for the further desegregation of the Huntsville School System. This Court approved Plan A, a neighborhood school plan by which an attendance zone in the immediate vicinity of each school including the Cavalry Hill and Terry Heights schools was created. Black students constituted about 65% in the Terry Heights zone. Substantially all of the white students in the attendance zone attended Terry Heights School, even though they were in the minority. The rate

of change has slowed in the past few years. It still has a projected enrollment of 28.27% white students and is still a well-integrated school.

5. Cavalry Hill School was originally an all-black school. It is completely surrounded by a low-rent housing project inhabited entirely by black families with the exception of one or two white families.

The attendance zone area for Cavalry Hill School contained in the neighborhood school plan proposed by the United States Office of Education and approved in 1971 includes a large area inhabited by white families. In 1971 if all of the white children zoned to Cavalry Hill School had attended it, the white children would have constituted about 33% of the school's attendance. Some of the white families sent their children to Cavalry Hill School, but most of them have sent their children to private schools. None of them are attending public school out of their assigned zone. One of the fathers who did send his children to Cavalry Hill School for two years testified that he withdrew one of them when he reached junior high level because he didn't believe the program offered was broad enough, and withdrew a younger child because the child didn't seem to be learning as well as he thought the child should. The fact that the composition of the student body at Cavalry Hill School is largely black is not for the lack of a good faith effort on the part of the Huntsville Board of Education.

6. The Huntsville Board of Education has established that the school assignments for Cavalry Hill School and Terry Heights School are genuinely non-discriminatory.

7. The Board of Education has already taken actions to improve the program at Cavalry Hill School. A year ago it assigned one of its best elementary principals to the school. System-wide tests a year ago had students at Cavalry Hill School with the lowest rating for reading. A year later Cavalry Hill School was ahead of four other schools in the reading test.

8. The Huntsville Board of Education has not attempted to halt or slow desegregation. Ever since the final plan was adopted in 1971 it has faithfully submitted the reports required by the plan. Whenever changes have been required in attendance zone boundaries in an attempt to equalize assignment loads at the various schools, it has petitioned the Court for permission to do so. The hearing held on July 10, 1974, was not the result of a petition filed by the United States, but the result of a petition by the School Board for approval by this Court to make further changes, including the development of an Exemplary Career Education oriented program at Cavalry Hill School for the purpose of improving the quality of education at that school.

9. The next nearest school to children in the Cavalry Hill School Zone is Terry Heights School, which is eight-tenths (.8) of a mile away. Terry Heights School is a well-integrated school, as has been shown above, with a projected enrollment of 71.73% black. Other elementary schools which the United States has recommended to be either paired or grouped with Cavalry Hill School, their respective distances from the school, and their projected black enrollments even without being paired with Cavalry Hill School, and the projected black enrollment if paired or grouped, are as follows:

Montview	2.0 miles	13.33%	40% or 41%
University Place	2.1 miles	10.28%	43%
Highlands	3.1 miles	18.67%	33%
Madison Pike	3.3 miles	9.42%	25% or 33%

It is evident from the above figures that these schools are already well integrated and constitute a part of a system under a desegregation plan which is working.

10. In the Huntsville school system, the neighborhood zone is the appropriate basis for determining public school assignments.

11. No children who live in the Cavalry Hill School attendance zone or in the Terry Heights School zone will be deprived of their constitutional rights by the continuation of a neighborhood school plan. The adoption of one of the Gvernment's suggested pairing or grouping alternatives in order to achieve a more ideal racial balance at the presently integrated Cavalry Hill and Terry Heights Schools could well disrupt the progress already achieved in the desegregation of the system and the schools involved and retard the process rather than advance it. If those students now in the two zones who are not attending the schools in which they are zoned cannot be induced to attend the prospects would appear to be dim to induce those who live in other zones to attend these schools by pairing or grouping.

Conclusions of Law

Based upon the foregoing findings the Court concludes that the petition of the Huntsville Board of Education filed herein on May 16, 1974, should be granted in the particulars spelled out in the judgment entered contemporaneously herewith.

Done this the 14th day of August, 1974.

H. H. Grooms
United States District Judge

DEPARTMENT OF PUPIL SERVICES

Enrollment End of First Scholastic Month
September 21, 1973

Schools	Number on Roll White Reg.-ular	White Spec. Ed.	White Total %	Non-White Reg. ular	Non-White Spec. Ed.	Non-White Total %
Blossomwood (1-6)	535	12	529 10 98.54	6	2	1.46
Butler (0-12)	2185		1856 84.94	329		15.06
Cavalry Hill (1-8)	623		25 4.01	598		95.99
Chaffee (1-6)	595		580 97.48	15		2.52
Chapman (1-8)	1473		1357 92.12	116		7.88
Colonial Hills (1-6)	631		341 54.04	290		45.96
Council (Special Center)		40	29 72.50		11	27.50
Davis Hills (1-8)	1764		1299 73.64	465		26.36
East Clinton (1-6)	396		278 70.20	118		29.80
Ed White (7-9)	1183		942 79.63	241		20.37
Farley (1-6)	170	11	158 5 90.06	12	6	9.94
Fifth Avenue (1-6)	329	19	172 17 54.31	157	2	45.69
Grissom (9-12)	2243		2228 99.33	15		.67
Highlands (1-6)	875		721 82.40	154		17.60
Huntsville High (9-12)	2126		1922 90.40	204		9.60
Huntsville Jr. (7-8)	590	19	503 11 84.40	87	8	15.60
Johnson (9-12)	2088		1589 76.10	499		23.90
Jones Valley (1-6)	728		721 99.04	7		.96
Lakewood (1-6)	841		604 71.82	237		28.18
Lee (9-12)	1272		1063 83.57	209		16.43
Lincoln (1-6)	503	6	411 4 81.53	92	2	18.47
Madison Pike (1-6)	956		890 93.10	66		6.90
McDonnell (1-6)	620		558 90.00	62		10.00
Monte Sano (1-6)	182		182 100.00	0		.00
Montview (1-6)	540		472 87.41	68		12.59
Mountain Gap (1-8)	1280		1270 99.22	10		.78
R. L. Stone (7-9)	813	40	516 14 62.13	297	26	37.87
Ridgecrest (1-6)	1039	7	968 7 93.21	71	0	6.79
Rolling Hills (1-5)	966	9	623 2 64.10	343	7	35.90
Terry Heights (1-6)	473		133 28.12	340		71.88
University Place (1-6)	412		372 90.29	40		9.71
Weatherly Heights (1-6)	1146		1137 99.21	9		.79
West Huntsville (1-6)	545	20	322 13 59.29	223	7	40.71
Westlawn (7-9)	1291		1229 95.20	62		4.80
West Mastin Lake (1-6)	920		670 72.83	250		27.17
Whitesburg (1-8)	1641		1619 98.66	22		1.34
Home Bound		17	13 76.47		4	23.53
Juvenile Detention Home		7	3 71.41		4	28.57
Total	33974	207	28260 128 83.05	5714	79	16.95
Grand Total		34181				

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1012

HUNTSVILLE BOARD OF EDUCATION, ET AL., PETITIONERS

v.

SONNIE WELLINGTON HEREFORD, IV, ET AL.,
AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 504 F. 2d 857. The findings of fact and conclusions of law of the district court (Pet. App. A8-A13) and its decree (Pet. App. A4-A8) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1974. The petition for a writ of certiorari was filed on February 13, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a school board operating a dual school system has sustained its burden of converting to a unitary system when there exists within the school system an identifiably black elementary school that could be paired or grouped with several nearby predominantly white elementary schools.

STATEMENT

This school desegregation case was filed by black children and their parents on March 11, 1963. The district court entered an order requiring the desegregation of the Huntsville public school system and directing petitioners to submit to the court a desegregation plan to be implemented for the second term of the 1963-1964 school year. In its findings of fact and conclusions of law, the court stated that prior to *Brown* v. *Board of Education*, 347 U.S. 483, the Huntsville school system was a dual system pursuant to the laws of Alabama and that subsequent to the *Brown* decision no steps had been taken by petitioners to convert the dual system into a unitary system. After several years of litigation concerning the desegregation plan, the final plan was approved by the court of appeals in 1971 in *Hereford* v. *Huntsville Board of Education*, 448 F. 2d 784 (C.A. 5) (Pet. App. A1).

On May 16, 1974, petitioners filed in the district court a motion seeking approval of certain changes in the desegregation plan (*id.* at A8). The United States, as plaintiff-intervenor, objected to the continuation under the new plan of the disproportionate concentration of black students at Cavalry Hill Elementary School (*ibid.*).[1] The district court ordered the School Board to prepare and file a report concerning alternative methods of student assignment for Cavalry Hill School (*ibid.*). In July 1974, the court held a hearing on the petition and report of the School Board (*id.* at A9).

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[1]The United States also objected to the assignment plan with respect to the Terry Heights and Roy Stone schools. The petition presents no issue concerning those schools.

The district court found that in September 1973 there were 34,181 students in the Huntsville school system of whom 5,793, or 16.95 percent, were non-white (*id.* at A9, A14). Of the 623 students enrolled at Cavalry Hill in September 1973, only 25, or 4.01 percent, were white (*id.* at A10, A14). The court also found that in September 1970 Cavalry Hill had an enrollment of 960, with only two whites; and in June 1972 it had an enrollment of 730 with only 55 whites (*id.* at A10). Despite these statistics, the court concluded that Cavalry Hill "is now desegregated" (*ibid.*).

The court attributed the high percentage of black students at Cavalry Hill to its location in a predominantly black housing project and to white flight; it was "not for the lack of a good faith effort on the part of the Huntsville Board of Education" (*id.* at A11). The court rejected the recommendation of the United States that Cavalry Hill be paired or grouped with several predominantly white elementary schools located within two or three miles of Cavalry Hill (*id.* at A12). The court stated that "the prospects would appear to be dim" that white students would attend Cavalry Hill if it were grouped or paired with other schools and that pairing or grouping "could well disrupt the progress already achieved in the desegregation of the system and the schools involved" (*id.* at A13).

The court of appeals reversed the district court's order with respect to Cavalry Hill School (*id.* at A1-A3). The court stated that, although the desegregation plan it had approved in 1971 projected Cavalry Hill to be 67.6 percent black, with 765 black students and 367 white

students, "[t]he white students have never attended" (*id.* at A3). In addition to the recent attendance figures cited by the district court, the court of appeals noted that in September 1974 there were 368 black students and only 15 white students at Cavalry Hill (*ibid.*). It held that "[t]he district court should have required that the school board modify the student assignment plan to desegregate Calvary [*sic*] Hill school," because "this school has never been desegregated" (*ibid.*). The court of appeals ordered the district court to follow the method of desegregation set out in *Cisneros* v. *Corpus Christi Independent School District*, 467 F.2d 142 (C.A. 5) (*en banc*), certiorari denied, 413 U.S. 920.

ARGUMENT

As a school board operating a dual system at the time of *Brown* v. *Board of Education, supra*, the Huntsville Board of Education was charged with the affirmative duty to take whatever steps might be necessary to convert a unitary system in which racial discrimination would be eliminated "root and branch." *Green* v. *County School Board*, 391 U.S. 430, 438; *Swann* v. *Board of Education*, 402 U.S. 1. The record indicates that the Huntsville Board of Education has not completed its affirmative duty to desegregate its school system. Cavalry Hill School has never been desegregated. This school has never had more than 7.44 percent white students and has remained identifiably black throughout its history. Although *Swann* v. *Board of Education, supra*, acknowledges that one-race, or virtually one-race, schools may be constitutionally permissible, Cavalry Hill is not the type of school envisioned in that case. Cavalry Hill is within 2 or 3 miles of several predominantly white elementary schools with which pairing or grouping would be relatively simple.

The district court declined to order the pairing or grouping of schools because it believed that white students would not attend Cavalry Hill. However, fear of white flight "cannot * * * be accepted as a reason for achieving anything less than complete uprooting of the dual public school system." *United States* v. *Scotland Neck Board of Education,* 407 U.S. 484, 491. The district court's finding that the pairing or grouping of schools "could well disrupt the progress already achieved in the desegregation of the system" (Pet. App. A13) is speculative and similarly is not a justification for achieving less than the complete desegregation of the school system.

The district court found that the Huntsville Board of Education had made good faith efforts to desegregate its school system. However, in order to sustain its burden in this case, the Board had to show that its past segregative acts did not create or contribute to the current segregated condition of Cavalry Hill School. *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189. The Board made no such showing here. On the contrary, the record indicates that the current segregated condition of Cavalry Hill, which has remained an identifiably black school throughout its history, results from past segregative acts by the Huntsville Board of Education.

The decision of the court of appeals, requiring petitioner to eliminate all vestiges of state-imposed segregation, is fully consistent with other decisions of that court which have required revisions in student assignment plans if an interim plan has proved ineffectual. See, *e.g.*, *Ellis* v. *Board of Public Instruction of Orange County,*

Florida, 465 F.2d 878 (C.A. 5), certiorari denied, 410 U.S. 966; *Weaver* v. *Board of Public Instruction of Brevard County, Florida*, 467 F.2d 473 (C.A. 5), certiorari denied, 410 U.S. 982. Further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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